

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

SAMMY JOHNSON,)	
)	
Plaintiff,)	
)	
vs.)	CIV-13-1333-HE
)	
COMANCHE COUNTY BOARD)	
OF COUNTY COMMISSIONERS,)	
et al.,)	
)	
Defendants.)	

REPORT AND RECOMMENDATION

Plaintiff, a state prisoner appearing *pro se* and *in forma pauperis*, filed this action pursuant to 42 U.S.C. §1983 on December 19, 2013. The matter was referred to the undersigned Magistrate Judge by United States District Judge Heaton on December 20, 2013, for initial proceedings consistent with 28 U.S.C. § 636(b)(1)(B). For the reasons set forth herein, it is recommended that the cause of action be dismissed without prejudice due to Plaintiff's failure to pay the initial partial filing fee.

With his Complaint, Plaintiff filed a Motion for Leave to Proceed *In Forma Pauperis* in conformance with 28 U.S.C. §1915(a) as amended. After review of Plaintiff's motion on December 20, 2013, the undersigned granted Plaintiff's motion to proceed without full

prepayment of the filing fee and directed Plaintiff to pay an initial partial filing fee of \$7.36 by January 8, 2014, in accordance with 28 U.S.C. §1915(b)(1). Plaintiff was advised that he would be required to make monthly payments of 20 percent of the preceding month's income credited to his prison account(s) until the full \$350 filing fee was paid. He was also advised that failure to either (1) pay the initial partial filing fee, or (2) show cause in writing for his failure to do so could result in dismissal of this action without prejudice to refiling. On January 2, 2014, Plaintiff filed another "Motion for Leave to Proceed Without Payment of Initial Partial Filing Fee" (Doc. #7) which was construed by the undersigned as a motion for extension of time and Plaintiff was granted until January 24, 2014, to pay the initial partial filing fee of \$7.36. As of this date, the Court's records show that Plaintiff has failed to either pay the initial partial filing fee, show cause in writing why he is unable to do so, or request a further extension of time within which to pay the required initial partial filing fee. Because of Plaintiff's failure to pay the required initial partial filing fee and the expiration of the time given Plaintiff to make such payment, the action should be dismissed without prejudice to refiling. LCvR 3.4(a); Freeman v. Colo. Dep't of Corrections, 396 Fed.Appx. 543, 2010 WL 3818077 (10th Cir. Oct. 1, 2010) (affirming dismissal without prejudice of §1983 action for failure to pay initial partial filing fee)(unpublished op.); Barnett v. Ray, 320 Fed. Appx. 823, 2009 WL 821419 (10th Cir. Mar. 31, 2009)(unpublished op.)(same).

RECOMMENDATION

Accordingly, it is recommended that Plaintiff's cause of action be dismissed without

prejudice to refiling for failure to pay the initial partial filing fee or to show cause for his failure to do so. Plaintiff is advised of his right to file an objection to this Report and Recommendation with the Clerk of this Court by February 24th, 2014, in accordance with 28 U.S.C. §636 and LCvR 72.1. Plaintiff is further advised that failure to make timely objection to this Report and Recommendation waives his right to appellate review of both factual and legal issues contained herein. Moore v. United States of America, 950 F.2d 656 (10th Cir. 1991); cf. Marshall v. Chater, 75 F.3d 1421, 1426 (10th Cir. 1996)(“Issues raised for the first time in objections to the magistrate judge’s recommendations are deemed waived.”).

This Report and Recommendation disposes of all issues referred to the undersigned Magistrate Judge in the captioned matter, and any pending motion not specifically addressed herein is denied.

ENTERED this 3rd day of February, 2014.


GARY M. PURCELL
UNITED STATES MAGISTRATE JUDGE